# Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO M-01-22-95
GOPAL SRI RAM, SITI NORMA YAAKOB AND ABU MANSOR JJCA
10 OCTOBER AND 7 NOVEMBER 1995

***Civil Procedure*** *— Parties — Non-joinder of party — Failure to add proper parties in main trial and appeal — Whether serious impediment — Whether late application to add party should be allowed — Considerations to be taken into account*

***Companies and Corporations*** *— Members' rights — Fraud upon the minority — Meaning of — Whether equivalent to common law fraud or dishonesty — Facts which need to be proven*

***Companies and Corporations*** *— Members' rights — Derivative action — Procedural requirements — Whether title of action must show representative capacity — Parties to be named — Facts necessary to be pleaded*

***Civil Procedure*** *— Pleadings — Necessity for express pleadings — Derivative action — Fraud on the minority — Whether necessary for express statement that action is for benefit of company*

***Civil Procedure*** *— Originating summons — Writ more appropriate — Continuance of action as if begun by writ — Judge's discretion — Considerations to be taken into account — Rules of the High Court 1980 O 28 r 8(1)*

The appellant held 46.7% of the shares in Tunas Murni Sdn Bhd ('Tunas Murni') which was a defendant in the court below, with the second respondent, Wong Akau ('Wong'), holding 15.9%, and one George Thomas ('Thomas'), who was not made a party to the suit, holding 37.4%. The dispute arose in respect of three pieces of land ('the land') bought by Tunas Murni which was later transferred to the first respondent ('Krubong'). The appellant alleged that Krubong had obtained the transfer of the land by abusing a power of attorney granted by Tunas Murni to Krubong for the purpose of enabling Krubong to obtain the subdivision of the land for development. The appellant brought a minority shareholder's action by originating summons in his own name alleging fraud on a minority. The essence of the appellant's complaint turned upon alleged breaches of the fiduciary duty owed to Tunas Murni by Krubong, Wong and Thomas. The respondents, however, argued, inter alia, that the appellant's action was in substance not a derivative action as it lacked the necessary elements. The judicial commissioner dismissed the action solely on the ground that common law fraud had not been established. [See [1995] 2 MLJ 130.] The appellant appealed. In this appeal, Tunas Murni was not made a respondent although the appellant later applied to do so after some delay.

**Held**, dismissing the appeal on different grounds: A

(1) (Per **Gopal Sri Ram JCA**) The application to add Tunas Murni as a respondent was not allowed as no satisfactory explanation was given for the delay. Also, allowing the application would have meant granting the appellant leave to appeal against Tunas Murni out of time, an adjournment of the appeal to enable B service of the amended notice of appeal to be effected on all parties and the filing and service of fresh records of appeal.

(2) (Per **Gopal Sri Ram JCA**) The failure to add Thomas as a co-defendant to the main action and Tunas Murni as a respondent to the appeal were serious impediments to the appellant's action C as his success or failure depended on whether he could make out the case alleged against Thomas.

(3) (Per **Gopal Sri Ram JCA**) The expression 'fraud upon the minority' is a term of art and has absolutely nothing whatsoever to do with actual fraud or deception at common law. It includes lack of probity although it is not necessary to prove dishonesty. D Therefore, it is sufficient for a plaintiff to show that those wielding majority control abused the powers vested in them by using or omitting to use their powers for an oblique or collateral motive or purpose and not for the true purpose for which the power was entrusted to them either by the memorandum and articles of E association, by statute or the general law. To equate common law fraud to 'fraud upon a minority' was clearly wrong.

(4) (Per **Gopal Sri Ram JCA**) A plaintiff in a derivative action cannot sue in his own name, without indicating that he is bringing the action in a representative capacity and for the benefit of the company of which he is a shareholder. A minority shareholder F may bring an action on behalf of himself and all the other shareholders of the company, other than the defendants. The wrongdoers and the company must be cited as defendants. The title to the action must reflect that the suit is being brought in a representative capacity. The pleading must disclose that it is a G derivative action and recite the facts that make it so. Further, there must be an express statement in the pleading that the action is being brought for the benefit of the company named as a defendant. An action that does not meet these requirements is liable to be struck out as being frivolous and vexatious. H

(5) (Per **Gopal Sri Ram JCA**) There were too many flaws in the action to permit the proceedings to continue as if they had begun by writ. The intitulement of the appellant as plaintiff in his personal capacity in what purports to be a derivative action was wrong. The facts alleged did not fall within a minority shareholder's action for fraud on the minority and the relief I claimed did not fit the facts alleged. As such, it was best that the appellant be given liberty to file a fresh action by way of a writ.

A [**Bahasa Malaysia summary**

Perayu memegang 46.7% daripada syer di dalam Tunas Murni Sdn Bhd ('Tunas Murni') yang merupakan salah satu defendan di mahkamah bawah, dengan penentang kedua, Wong Akau ('Wong'), memegang 15.9%, dan seorang bernama George Thomas ('Thomas'), B yang tidak dijadikan satu pihak kepada guaman itu, memegang 37.4%. Pertikaian itu timbul berkenaan dengan tiga bidang tanah ('tanah itu') yang dibeli oleh Tunas Murni dan kemudiannya dipindahmilik kepada penentang pertama ('Krubong'). Perayu mengata bahawa Krubong telah memperolehi pindahmilikan tanah itu dengan menyalahgunakan surat kuasa wakil yang diberikan oleh Tunas Murni C kepada Krubong bagi tujuan membolehkan Krubong mendapatkan pemecahan lot tanah itu untuk dimajukan. Perayu telah membawa suatu tindakan pemegang syer minoriti melalui saman pemula di dalam namanya sendiri dan mengata bahawa fraud telah dilakukan ke atas minoriti. Intipati aduan perayu berdasarkan pengataan tentang D kemungkiran kewajipan fidusiari yang harus diberikan kepada Tunas Murni oleh Krubong, Wong dan Thomas. Penentang, bagaimanapun, berhujah, antara lain, bahawa tindakan perayu itu pada amnya bukanlah suatu tindakan terbitan kerana ia tidak mempunyai unsur-unsur yang perlu. Pesuruhjaya kehakiman telah menolak tindakan itu atas dasar semata-matanya bahawa fraud common law tidak E dibuktikan. [Lihat [1995] 2 MLJ 130.] Perayu telah membuat rayuan. Di dalam rayuan ini, Tunas Murni tidak dijadikan satu penentang tetapi perayu kemudiannya telah memohon untuk berbuat demikian selepas sedikit kelengahan.

F **Diputuskan,** menolak rayuan itu:

(1) (Oleh **Gopal Sri Ram HMR**) Permohonan untuk menambahkan Tunas Murni sebagai satu penentang tidak dibenarkan kerana penjelasan yang memuaskan tidak diberikan untuk kelengahan itu. Juga, tindakan membenarkan permohonan itu bermakna memberikan perayu kebenaran untuk membuat rayuan terhadap G Tunas Murni di luar had masa, suatu penangguhan rayuan itu untuk membolehkan penyampaian notis rayuan dibuat kepada semua pihak dan pemfailan dan penyampaian rekod rayuan baru.

(2) (Oleh **Gopal Sri Ram HMR**) Kegagalan untuk menambah Thomas sebagai seorang defendan bersama kepada tindakan H utama dan Tunas Murni sebagai penentang kepada rayuan itu adalah halangan serius kepada tindakan perayu kerana kejayaan atau kegagalannya bergantung pada kebolehannya untuk membuktikan kes yang dikatakan terhadap Thomas.

(3) (Oleh **Gopal Sri Ram HMR**) Kenyataan 'fraud ke atas minoriti' I adalah suatu istilah khas dan tidak kena-mengena dengan fraud sebenar ataupun penipuan di sisi common law. Ia termasuk kekurangan kejujuran walaupun adalah tidak perlu untuk

membuktikan ketidakjujuran. Maka, adalah mencukupi untuk seseorang plaintif menunjukkan bahawa mereka yang memegang kuasa majoriti telah menyalahgunakan kuasa yang diletakhak pada mereka dengan menggunakan atau abai menggunakan kuasa mereka untuk motif atau niat tidak langsung atau sampingan dan bukan bagi tujuan sebenar untuk mana kuasa itu telah diberikan kepada mereka sama ada melalui memorandum dan perkara-perkara persatuan, oleh statut atau undang-undang umum. Penyamaan fraud common law dengan fraud ke atas minoriti adalah jelasnya salah.

(4) (Oleh **Gopal Sri Ram HMR**) Seorang plaintif di dalam suatu tindakan terbitan tidak boleh mendakwa atas namanya sendiri, tanpa menunjukkan bahawa beliau membawa tindakan itu di dalam keupayaan perwakilannya dan untuk faedah syarikat di mana beliau adalah seorang pemegang syer. Pemegang syer minoriti boleh membawa tindakan bagi pihak dirinya sendiri dan pemegang syer syarikat itu yang lain, selain daripada defendan. Orang yang bersalah dan syarikat itu mesti dinyatakan sebagai defendan. Judul tindakan mestilah membayangkan bahawa guaman itu dibawa dalam keupayaan perwakilan. Pliding itu mesti mendedahkan bahawa ianya adalah suatu tindakan terbitan dan memberi fakta yang menunjukkan keadaan itu. Juga, mestilah ada kenyataan yang jelas dalam pliding bahawa tindakan itu dibawa untuk manfaat syarikat yang dinamakan sebagai defendan. Tindakan yang tidak menepati kesemua keperluan ini akan dibatalkan sebagai remeh dan menyusahkan.

(5) (Oleh **Gopal Sri Ram HMR**) Terdapat terlalu banyak kecacatan di dalam tindakan itu untuk membolehkan prosiding itu diteruskan seperti ia telah dimulakan melalui writ. Penyataan perayu sebagai plaintif di dalam keupayaan peribadinya di dalam apa yang kononnya adalah suatu tindakan terbitan adalah salah. Fakta yang dikatakan itu tidak termasuk dalam tindakan pemegang syer minoriti kerana fraud atas minoriti dan relief yang dituntut tidak sesuai dengan fakta yang dikatakan itu. Oleh itu, adalah lebih baik jika perayu diberi kebenaran untuk memfailkan tindakan yang baru melalui writ.]

**Notes**

For cases on parties, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2362–2498.

For cases on members' rights, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 188–219.

For cases on the necessity for express pleadings, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2613–2629.

For cases on originating summonses, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2334–2351.

**Cases referred to**

*Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 (distd)

*Atherton v Plane Creek Central Mill Co Ltd* [1914] QSR 73 (refd)

*Australian Coal and Shale Employees Federation v Smith* (1937) 38 SR (NSW) 48 (folld)

*Bamford v Bamford* [1970] Ch 212; [1969] 1 All ER 969; [1969] 2 WLR 1107 (refd)

*Biala Pty Ltd v Mallina Holdings Ltd (No 2)* (1993) 11 ACLC 1082 (folld)

*Burland v Earle* [1902] AC 83 (refd)

*Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 (refd)

*Davis v Commercial Publishing Co of Sydney Ltd* (1901) 1 SR (NSW) Eq 37 (refd)

*Edwards v Halliwell* [1950] 2 All ER 1064 (refd)

*Estmanco (Kilner House) Ltd v Greater London Council* [1982] 1 All ER 437; [1982] 1 WLR 2 (folld)

*Foss v Harbottle* (1843) 67 ER 189 (refd)

*Hospital Products Ltd v United States Surgical Corp* (1984) 55 ALR 417; (1984) 156 CLR 41 (refd)

*London Passenger Transport Board v Moscrop* [1942] AC 332 (folld)

*MacDougall v Gardiner* (1875) 1 Ch D 13 (refd)

*Mozley v Alston* (1847) 41 ER 833 (refd)

*New South Wales Wood Process Ltd v Gorton* (1915) 15 SR (NSW) 454 (refd)

*Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204; [1982] 1 All ER 354; [1982] 2 WLR 31 (refd)

*Royal Brunei Airlines Sdn Bhd v Tan Kok Ming Philip* [1995] 3 MLJ 74 (refd)

*Tan Guan Eng & Anor v Ng Kweng Hee & Ors* [1992] 1 MLJ 487 (folld)

*Wallersteiner v Moir (No 2)* [1975] QB 373; [1975] 1 All ER 849; [1975] 2 WLR 389 (not folld)

**Legislation referred to**

Companies Act 1965 s 181

National Land Code 1965 s 340

Rules of the High Court 1980 O 28 r 8(1)

**Appeal from**: Originating Summons No 24–12–95 (High Court, Melaka)

*B Thangaraj* (*Thangaraj & Associates*) for the appellant.

*Wong Kim Fatt* (*Maniam Raju* with him) (*Gunaretnam & Co*) for the first, second and third respondents.

*Abdul Rahman Putra* (State Legal Adviser) for the fourth respondent.

*Hira Singh*, *Wong Kim Fatt* and *CY Choong* (*KC Yap Kamaludin & Partners*) for the fifth and sixth respondents. A

*Zainur Zakaria* (*Zainur Zakaria & Co*) for Tunas Murni Sdn Bhd, respondent on the motion to add.

*Cur Adv Vult* B

*10 October 1995*

**Gopal Sri Ram JCA**: The appellant before us is a shareholder of Tunas Murni Sdn Bhd ('Tunas Murni'). Initially, he commenced an action against the respondents using Tunas Murni's name as plaintiff. That action was not supported by a majority of the board of directors. The respondents before us (defendants in that earlier suit) applied to strike out the action. They succeeded. The appellant then brought a second action by originating summons. He claimed that it was a derivative action. He joined the company as a co-defendant and claimed a whole range of declaratory relief. In the environment of company law, it is commonly called a minority shareholder's action. We will say something more about such actions later in this judgment. C D

The instant respondents resisted the second action. They argued, inter alia, that it was in substance not a derivative action at all because it lacked the elements of such an action. The learned judicial commissioner dismissed the action solely on the ground that common law fraud had not been established and that consequently the title of the first respondent was indefeasible (see [1995] 2 MLJ 130). It is against this decision that the present appeal has been brought. After hearing counsel for the appellant, we did not consider it necessary to trouble counsel for the respondents for a reply. We agreed with counsel for the appellant that the judicial commissioner arrived at his decision for the wrong reasons. But we upheld his order nevertheless because we formed the view that his ultimate decision was correct. So that res judicata should not be even suggested, we gave the appellant liberty to commence a fresh action by writ. The reasons for our decision now follow. E F G

At the outset, we wish to make it clear that because of the orders we made on this appeal, it is desirable that we say as little as possible about the facts or the substantial merits of the case. This is to avoid our remarks being misunderstood as amounting to the pronouncement of a concluded view upon these matters. They are certainly not intended to have that effect. However, in order to appreciate the true legal position, it is necessary to allude to some of the salient facts. H

As earlier observed, the appellant is a shareholder of Tunas Murni. He owns 46.7% of its shares. There are two other shareholders. They are the second respondent who owns 15.9% and one George Thomas ('Thomas') who owns 37.4%. At present, the appellant and Thomas are the only directors of the board of Tunas Murni. The second respondent was at one time a member of the board but subsequently resigned. I

A At all material times, Tunas Murni was the registered proprietor of three pieces of land which it had purchased from the previous registered proprietor. These lands stand at the heart of the present dispute.

On 8 June 1993, an agreement was entered into between Tunas Murni and the first respondent under the terms of which the former B appointed the latter to arrange for the subdivision and development of the lands in question. On the same date, it executed an irrevocable power of attorney in favour of the first respondent. Later, the lands were transferred to the first respondent.

As earlier observed, the appellant in his summons asked for several C declarations and orders which in essence attack the aforesaid transfer. The complaints range from defeasibility of the first respondent's registered title to serious allegations of impropriety directed against the first, second and third respondents as well as Thomas. Despite all this, Thomas was not added as a party to the action. On appeal, Tunas Murni was not cited as a respondent. An eleventh hour attempt to add it as a respondent to the D appeal was vigorously opposed by the respondents.

Whether the addition ought to be permitted was a matter within our discretion. Taking into account all the relevant circumstances, we formed the view that the motion ought to be refused.

There was some delay in making the application for which no E satisfactory explanation was given. Also, allowing the application would have meant granting the appellant leave to appeal against Tunas Murni out of time, an adjournment of the appeal to enable service of the amended notice of appeal to be effected on all parties and the filing and service of fresh records of appeal. The factors against the grant of the orders sought by the appellant in his motion to this court far outweighed those operating F in favour of the grant.

In our judgment, the failure to add Thomas as a co-defendant to the main action and the failure to add Tunas Murni as a respondent to the appeal were serious impediments that stood in the way of the appellant's success before this court. In order to overcome the difficulty in which he G found himself, the appellant relied on the decision of the Supreme Court in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241. But a close examination of that case shows that the factual matrix upon which that decision was based is very different from that obtaining in the present appeal. Thus, unlike *Alor Janggus*, the director H who was not joined as a party is one whose conduct has been assailed on the footing that he had breached the trust and confidence reposed in him as a fiduciary. The success or failure of the appellant's case depends very much upon whether he can make out the case alleged against Thomas.

We think that the answer to the appellant's contention that the action is properly constituted and may proceed notwithstanding the non-joinder I of the alleged defalcating director is to be found in the following passage in the speech of Viscount Maugham in *London Passenger Transport Board v Moscrop* [1942] AC 332 at p 345:

> I also think it desirable to mention the point as to parties in cases where a declaration is sought. The present appellants were not directly prejudiced by the declaration and it might even have been thought to be an advantage to them to submit to the declaration, but, on the other hand, the persons really interested were not before the court, for not a single member of the Transport Union was, nor was that union itself, joined as a defendant in the action. It is true that in their absence they were not strictly bound by the declaration, but the courts have always recognized that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence, and that, *except in very special circumstances, all persons interested should be made parties, whether by representation orders or otherwise, before a declaration by its terms affecting their rights is made.* In the Chancery Division, in which this case started, the rule would seem to be almost invariable, and the well-established practice in actions by shareholders and debenture holders may be mentioned as instances of the rule. With the greatest respect for the Court of Appeal, I think that the amended declaration pronounced by that court, even if the section were applicable, ought not to have been made. (Emphasis added.)

These words though spoken in the context of declaratory relief are of general application.

As far as the instant appeal is concerned, we need say no more than that the very special circumstances spoken of by Viscount Maugham are absent in the present case. Consequently, we are unable to accede to the submission of counsel in this respect.

Now, when he began his argument on the appeal, counsel for the appellant informed us that this matter had commenced as a rather simple summons for construction of a power of attorney. Somewhere along the way, he said, it had ballooned into an action by a minority shareholder of a company. But an examination of the record shows that it was the appellant who seems to have put the question in issue in his written submissions filed in support of the summons. In consequence, it would appear that he had opened a door through which the respondents drove a coach and four. There was, in reply to his argument, addressed a whole host of submissions touching upon the quantum of proof required under the fraud exception contained in s 340 of the National Land Code 1965 and the ingredients that go to make up a derivative action. The nett result was that in the cloud of dust that the ingenuity of counsel had created, all concerned, including the court, lost sight of the proverbial wood from the trees. If the learned judicial commissioner had kept in mind the relevant principles applicable to the case before him, he would not have succumbed to the error of dealing with the dispute as a case requiring the proof of actual fraud for the displacement of a registered title.

But these matters aside, and without going into the matter in any great detail, it suffices for us to say that the affidavits delivered in the court below disclose serious disputes of fact on all material issues raised by the appellant, including the nature of the entire transaction, its aim and purpose. And it emerged during argument that the essence of the appellant's complaint turned upon alleged breaches of the fiduciary duty owed to the company by the first and second respondents and by Thomas.

A If, as submitted by counsel, the first respondent, in breach of trust, is exploiting the lands in question and reaping huge profits therefrom; that this has been made possible by the acts of the second respondent and Thomas as accessories to that breach; that these profits belong in equity to Tunas Murni, then, it is for the appellant to pursue the appropriate remedy. In this context, it is sufficient for us to refer to the decision of the B High Court of Australia in *Hospital Products Ltd v United States Surgical Corp* (1984) 55 ALR 417 at p 462; (1984) 156 CLR 41 at p 107 and that of the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan Kok Ming Philip* [1995] 3 MLJ 74. In the former case, the following passages in the dissenting judgment of Mason J ((1984) 55 ALR at p 462; (1984) 156 C CLR at p 107) are of particular relevance:

> Relief for breach of fiduciary duty
>
> (a) General principle governing liability to account
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> The principle, accepted by the courts below, is that the fiduciary cannot be D permitted to retain a profit or benefit which he has obtained by reason of his breach of fiduciary duty (*Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at p 393; *Queensland Mines Ltd v Hudson* (1978) 18 ALR 1 at p 4; (1978) 52 ALJR 399 at p 401). A fiduciary is liable to account for a profit or benefit if it was obtained: (1) in circumstances where there was a conflict, or possible conflict of interest and duty; or (2) by reason of E the fiduciary position or by reason of the fiduciary taking advantage of opportunity or knowledge which he derived in consequence of his occupation of the fiduciary position.
>
> (b) Constructive trust
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> Any profit or benefit obtained by a fiduciary in either of the two situations F already described is held by him as a constructive trustee (*Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* (1958) 100 CLR 342 at p 350). Neither principle nor authority provide any support for the proposition that relief by way of constructive trust is available only in the case where a profit or benefit obtained by the fiduciary was one which it was an incident of his duty to obtain for the person to whom he owed the fiduciary duty. Once it G is established that the fiduciary is liable to account for a profit or benefit which he has obtained there can be no objection to his being held to account as a constructive trustee of that profit or benefit. It can make no difference that it was not his duty to obtain the profit or benefit for the person to whom the duty was owed. What is important is that the advantage has accrued to him in breach of his fiduciary duty or by his misuse of his H fiduciary position. The consequence is that he must account for it and in equity the appropriate remedy is by means of a constructive trust.

We hasten to add that our remarks upon this part of the case are not for a moment to be taken as stating that an action mounted on the suggested basis will succeed. All we wish to say is that the facts as alleged in the affidavits, if true, do not support the cause of action presently relied upon I by the appellant.

The procedural obstacles we spoke of earlier and the view we take of the erroneous cause of action pursued by the appellant, namely, the reconveyance of the lands to Tunas Murni, constitute sufficient grounds

for the dismissal of the appeal. Unfortunately, as earlier observed, there are some passages in the judgment of the learned judicial commissioner which, if left uncommented upon, may lead one to believe that we agree with his statement of the law upon the subject of minority shareholders' actions. This is certainly not the case and we owe it to the efforts of counsel for both sides to restate the law governing such actions.

We begin with the rule in *Foss v Harbottle* (1843) 67 ER 189. The rule has two limbs. The first limb of the rule — and the present appeal has nothing to do with its application — is that a court will not interfere with the internal workings of a corporation upon a matter which is capable of being ratified by a majority of shareholders present and voting at a general meeting of the company. The content of the first limb, although it derives its name from the case just cited, in truth finds its origins in the earlier decision in *Mozley v Alston* (1847) 41 ER 833. The modern restatement of the rule is to be found in the judgment of Harman LJ in *Bamford v Bamford* [1970] Ch 212; [1969] 1 All ER 969; [1969] 2 WLR 1107.

The second limb of the rule is of much wider purport and is universal in its application. It is based upon the doctrine that only he who has been injured may sue. Translated into company law, the proposition may be stated thus. If a wrong has been done to a company, then it is the company which is the proper plaintiff in an action brought to redress the injury. An individual shareholder or even a group of shareholders forming a minority on the floor of a general meeting of the company have no locus standi to bring an action to remedy a wrong done to a company. See *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204; [1982] 1 All ER 354; [1982] 2 WLR 31.

Perhaps the clearest statement of the rule is to be found in the judgment of Jenkins LJ in *Edwards v Halliwell* [1950] 2 All ER 1064 at p 1066:

> The rule in *Foss v Harbottle*, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then *cadit quaestio*.

There are several exceptions to the rule in *Foss v Harbottle*, both as a result of case law and through the intervention of Parliament. For present purposes, there are two exceptions that call for detailed discussion. We will refer to these later in this judgment.

The several exceptions to the rule in *Foss v Harbottle* that are the product of case law appear in the illuminating judgment of Edgar Joseph Jr J (now FCJ) in *Tan Guan Eng & Anor v Ng Kweng Hee & Ors* [1992] 1 MLJ 487 at p 502. It is an important decision in the field of company law

A and in it there are set out several propositions that clarify the position in an area of the law that is not altogether free from difficulty. The exceptions referred to by his Lordship in that case are as follows [quoting from *Edwards v Halliwell*]:

(1) Ultra vires acts: 'in cases where the acts complained of are wholly ultra vires the company or association the rule has no application because there is no question of the transaction being confirmed by any majority'.

(2) Fraud on the minority: 'where what has been done amounts to what is generally called in these cases as a fraud on the minority and the wrongdoers are themselves in control of the company, the rule is relaxed in favour of the aggrieved minority who are allowed to bring what is known as a minority shareholders' action on behalf of themselves and all others'.

(3) Special majorities: 'an individual member [is not] prevented from suing if the matter ... [is] one which could validly be done or sanctioned, not by a simple majority of the members ... but only by some special majority'.

(4) Personal rights: Where 'the personal and individual rights of members of [the plaintiffs] have been invaded', the rule 'has no application at all'.

(5) When the justice of the case requires it, though this has been doubted by the English Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries (No 2)*.

For completeness, we refer to the statutory exception. This is to be found in the far-reaching and extremely beneficial remedy housed in s 181 of the Companies Act 1965. It may, on reflection, be inaccurate to refer to it as an exception of the rule now under consideration. In truth it is an abrogation of the rule itself in those circumstances to which the section applies.

We now turn to consider the one exception with which this case is concerned. It is the derivative action; an ingenious procedural device created by courts of equity; by which the rule of judicial non-interference is overcome. It is based upon the premise that the company which has been wronged is unable to sue because the wrongdoers are themselves in control of its decision-making organs and will not, for that reason, permit an action to be brought in its name. In these circumstances, a minority shareholder may bring an action on behalf of himself and all the other shareholders of the company, other than the defendants. The wrongdoers must be cited as defendants. So too must the company. The title to the action must reflect that the suit is being brought in a representative capacity. The statement of claim or other pleading filed in support of the originating process must disclose that it is a derivative action and recite the facts that make it so. Further, there must be an express statement in the pleading that the action is being brought for the benefit of the company named as a defendant. An action that does not meet these requirements is liable to be struck out as being frivolous and vexatious.

The juridical basis upon which the court entertains such an action is that the majority who have either *de facto* or *de jure* control of the company

have by commission or omission committed what is described as 'a fraud upon a minority'. It is the second category of case mentioned by Edgar Joseph Jr J in *Tan Guan Eng*. The principle was stated by James LJ in *MacDougall v Gardiner* (1875) 1 Ch D 13 at p 21 where he said:

> I think it is of the utmost importance in all these companies that the rule which is well known in this court as the rule in *Mozley v Alston* and *Lord v Copper Miners' Co* and *Foss v Harbottle* should be always adhered to; that is to say, that *nothing connected with internal disputes between the shareholders is to be made the subject of a bill by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent — unless there is something ultra vires on the part of the company qua company, or on the part of the majority of the company, so that they are not fit persons to determine it*; but that every litigation must be in the name of the company, if the company really desire it. Because there may be a great many wrongs committed in a company — there may be claims against directors, there may be claims against officers, there may be claims against debtors; there may be a variety of things which a company may well be entitled to complain of, but which, as a matter of good sense, they do not think it right to make the subject of litigation; and it is the company, as a company, which has to determine whether it will make anything that is wrong to the company a subject matter of litigation, or whether it will take steps itself to prevent the wrong from being done. (Emphasis added.)

In *Burland v Earle* [1902] AC 83 at p 93, Lord Davey, when delivering the advice of the Privy Council expressed the proposition in the following words:

> It is an elementary principle of the law relating to joint stock companies that the court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should prima facie be brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss v Harbottle* and *Mozley v Alston*, and in numerous later cases which it is unnecessary to cite. *But an exception is made to the second rule, where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the courts allow the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other shareholders are entitled to participate, as was alleged in the case of Menier v Hooper's Telegraph Works (1874) LR 9 Ch 350.* (Emphasis added.)

The decision of the English Court of Appeal in *Wallersteiner v Moir (No 2)* [1975] QB 373; [1975] 1 All ER 849; [1975] 2 WLR 389, is regarded by leading textbook writers as the high-level watermark of the law and procedure governing derivative actions in the sphere of company law. Lord Denning there traced its history and scope. He said ([1975] QB 373 at p 390; [1975] 1 All ER 849 at p 856; [1975] 2 WLR 389 at p 395):

> It is a fundamental principle of our law that a company is a legal person, with its own corporate identity, separate and distinct from the directors or shareholders, and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in *Foss v Harbottle* (1843) 2 Hare 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only person who can sue. Likewise, when it is defrauded by insiders of a minor kind, once again the company is the only person who can sue. But suppose it is defrauded by insiders who control its affairs — by directors who hold a majority of the shares — who then can sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorize the proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue them themselves. Yet the company is the one person who is damnified. It is the one person who should sue. In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress. In *Foss v Harbottle* 2 Hare 461 at pp 491–492, Sir James Wigram V-C saw the problem and suggested a solution. He thought that the company could sue 'in the name of some one whom the law has appointed to be its representative'. A suit could be brought:
>
> > 'by individual corporators in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled, ...'.
>
> This suggestion found its fulfilment in the *Merryweather* case [The reference here is to *Atwool v Merryweather*] which came before Sir William Page Wood V-C on two occasions: see (1864) 2 Hem & M 254 (sub nom *East Pant Du United Lead Mining Co Ltd v Merryweather*) and LR 5 Eq 464n. It was accepted there that the minority shareholders might file a bill asking leave to use the name of the company: see 2 Hem & M 254 at p 259; LR 5 Eq 464n at pp 467–468n. If they showed reasonable ground for charging the directors with fraud, the court would appoint the minority shareholders as representatives of the company to bring proceedings in the name of the company against the wrongdoing directors. By that means the company would sue in its own name for the wrong done to it. That would be, however, a circuitous course, as Lord Hatherley LC said himself, at any rate in cases where the fraud itself could be proved on the initial application.
>
> To avoid the circuity, Lord Hatherley LC held that the minority shareholders themselves could bring an action in their own names (but in truth on behalf of the company) against the wrongdoing directors for the damage done by them to the company, provided always that it was impossible to get the company itself to sue them. He ordered the fraudulent directors in that case to repay the sums to the company, be it noted, with interest: see

LR 5 Eq 464n at p 469n. His decision was emphatically approved by this court in *Menier v Hooper's Telegraph* (1874) 9 Ch App 350 and *Mason v Harris* (1879) 11 Ch D 97. The form of the action is always 'AB (a minority shareholder) on behalf of himself and all other shareholders of the company' against the wrongdoing directors and the company. That form of action was said by Lord Davey to be a 'mere matter of procedure in order to give a remedy for a wrong which otherwise would escape redress': see *Burland v Earle* [1902] AC 83 at p 93. Stripped of mere procedure, *the principle is that, where the wrongdoers themselves control the company, an action can be brought on behalf of the company by the minority shareholders on the footing that they are its representatives to obtain redress on its behalf.*

I am glad to find this principle well stated by Prof Gower in *Modern Company Law* (3rd Ed, 1969) at p 587, in words which I would gratefully adopt:

> 'Where such an action is allowed, the member is not really suing on his own behalf nor on behalf of the members generally, but on behalf of the company itself. Although ... he will have to frame his action as a representative one on behalf of himself and all the members other than the wrongdoers, this gives a misleading impression of what really occurs. The plaintiff shareholder is not acting as a representative of the other shareholders, but as a representative of the company. ... In the United States ... this type of action has been given the distinctive name of a "derivative action", recognizing that its true nature is that the individual member sues on behalf of the company to enforce rights derived from it.'

As it happens in the present case the formula has been discarded. The counterclaim by Mr Moir was prepared by a careful, learned and skilful member of the bar, Mr William Stubbs. It is not headed 'on behalf of himself and all the other shareholders'. It is just headed 'MJG Moir, plaintiff on counterclaim'. The two companies were made parties by being added to the counterclaim. The prayer is: 'Mr Moir counterclaims for' several declarations of wrongs done to the two companies and orders on Dr Wallersteiner to pay specified sums to the two companies, and that he do pay the costs of Mr Moir and the two companies. *No objection has been taken to that form of proceeding. No suggestion has been made that it should be amended. Quite right. Let it stand as it is. It is in accord with principle.* (Emphasis added.)

With the first of the two passages upon which we have placed emphasis, no quarrel may be had. For it accurately summarizes the law as it had been stated and developed by earlier courts whose decisions are entitled to the greatest of respect. But with regard to the latter passage to which we have lent emphasis, we are with great respect, unable to agree with Lord Denning that the practice there followed by the counterclaiming defendant 'accords with principle'. It does not.

We think it important not to overlook the fact that in that case counsel for Dr Wallersteiner did not raise any objections to Mr Moir's failure to correctly intitule his counterclaim: nor did he suggest an amendment. But that failure could not and, with respect to the Master of the Rolls, did not render the form of proceeding there adopted to be in accordance with the principles governing a derivative action.

In our judgment, the derivative action has not reached a stage where a plaintiff may disregard its procedural elements. We emphasize that it is not permissible for a plaintiff in a derivative action to sue in his own name, without indicating that he is bringing the action in a representative capacity and for the benefit of the company of which he is a shareholder. The correct position in law is that stated by Jordan CJ (NSW) in *Australian Coal and Shale Employees Federation v Smith* (1937) 38 SR (NSW) 48 at p 54:

> Thus, if the wrongdoers control the company and successfully resist all attempts to cause the company to sue, an individual shareholder suing on behalf of himself and all other shareholders except the defendants may sue to remedy the wrong, joining the company as defendant: *Burland v Earle.*

See also, *Davis v Commercial Publishing Co of Sydney Ltd* (1901) 1 SR (NSW) Eq 37; *New South Wales Wood Process Ltd v Gorton* (1915) 15 SR (NSW) 454; and *Atherton v Plane Creek Central Mill Co Ltd* [1914] QSR 73.

It now becomes necessary to deal with the expression 'fraud upon a minority' in the context of the exception under discussion. Although the real meaning of the phrase is unclear in the sense that one is unable as yet to determine its boundaries with any precision, an examination of the authorities leaves us to conclude that the following propositions may be taken as settled and beyond question:

(1) the expression 'fraud upon the minority' is a term of art and has absolutely nothing whatsoever to do with actual fraud or deception at common law;

(2) lack of probity comes within the ambit of the expression. But it is not necessary to prove dishonesty before a minority shareholder may claim relief under the doctrine; and

(3) it is sufficient for a plaintiff in an action grounded upon the doctrine to show that those wielding majority control abused the powers vested in them in the sense that they used or omitted to use their powers for an oblique or collateral motive or purpose and not for the true purpose for which the power was entrusted to them either by the memorandum and articles of association, by statute or the general law.

These propositions are borne out by the following passage in the judgment of Megarry V-C in *Estmanco (Kilner House) Ltd v Greater London Council* [1982] 1 All ER 437 at p 445; [1982] 1 WLR 2 at p 12:

> It was on the firmly established exception of 'fraud on a minority' that counsel for the applicant mainly relied. It does not seem to have yet become very clear exactly what the word 'fraud' means in this context; but I think it is plainly wider than fraud at common law, in the sense of *Derry v Peek* (1889) 14 App Cas 337; [1886–90] All ER Rep 1. In a valuable survey of the authorities, Templeman J recently came to the conclusion that this head permitted the minority to sue even though there had not been even an allegation of fraud: see *Daniels v Daniels* [1978] Ch 406; [1978] 2 All ER

89. That was a case in which a husband and wife were the two directors of a company and also the majority shareholders. They caused the company to sell to the wife land owned by the company; and four years later she sold the land for over 28 times what she had paid for it. The judge refused to strike out the statement of claim of minority shareholders in *Foss v Harbottle* proceedings against the two directors and the company. The principle which he derived from the cases was that '... a minority shareholder who has no other remedy may sue where directors use their powers, intentionally or unintentionally, fraudulently or negligently, in a manner which benefits themselves at the expense of the company' (see [1978] Ch 406 at p 414; [1978] 2 All ER 89 at p 96). Apart from the benefit to themselves at the company's expense, the essence of the matter seems to be an abuse or misuse of power. *'Fraud' in the phrase 'fraud on a minority' seems to be being used as comprising not only fraud at common law but also fraud in the wider equitable sense of that term, as in the equitable concept of a fraud on a power.* (Emphasis added.)

It is convenient at this stage to deal with the other case law exception to the rule in *Foss v Harbottle*. It is the fifth category of case referred to by Edgar Joseph Jr J in *Tan Guan Eng* [1992] 1 MLJ 487. As observed by his Lordship, the English Court of Appeal has frowned upon the creation of yet another exception to the rule based upon the justice of a particular case. However, the reluctance shown by the English tribunal does not appear to be shared by Australian courts.

In *Biala Pty Ltd v Mallina Holdings Ltd (No 2)* (1993) 11 ACLC 1082, a decision of the Supreme Court of Western Australia, Ipp J expressed a view of the law with which we are inclined to agree. This is what he said (at p 1102):

> Equity is concerned with substance and not form, and it seems to me to be contrary to principle to require wronged minority shareholders to bring themselves within the boundaries of the well-recognized exceptions and to deny jurisdiction to a court of equity even where an unjust or unconscionable result may otherwise ensue.
>
> The circumstances of modern commercial life are very different to those which existed when *Foss v Harbottle* was decided. The body of shareholders of a public company is ordinarily far greater in number, and the controlling minds of individual shareholders are far more difficult to identify than was the case with the relatively small corporations that existed 150 years ago. These developments and the complexities and sophistication of modern shareholding make it often very difficult to bring derivative claims within the established exceptions. To the extent that policy may be relevant in determining whether a fifth and general exception to the rule should be recognized, I consider it to be desirable to allow a minority shareholder to bring a derivative claim where the justice of the case clearly demands that such a claim be brought, irrespective of whether the claim falls within the confines of the established exceptions. In this regard, I note the recommendation of the Companies and Securities Advisory Committee reported in the Australian Securities Commission release issued on 2 August 1993 (CASAC 93/02), that the rule in *Foss v Harbottle* be abolished to allow shareholders and others a general right to bring derivative actions on behalf of companies.

A Accordingly, I uphold the argument of the plaintiffs that the court may allow a derivative action by shareholders in circumstances whenever the justice of the case so requires.

Returning to the appeal before us, we are satisfied that the learned judicial commissioner failed to satisfactorily direct his mind to the correct principles B of law that governed the case before him. In his written judgment, there is a statement to the effect that the action was unsustainable because there was no case of fraud pleaded by the appellant. What the learned judicial commissioner did in effect was to equate common law fraud with the expression 'fraud on a minority'. In this, he was clearly wrong. But, as we have earlier observed, the error into which he fell was largely contributed C to by the submission of counsel for the defendants in the court below.

It is plain that the appellant and the court were at cross-purposes at least to some extent upon the nature of the claim that was being pressed. The appellant, before he was side-tracked, based his argument on the doctrine of 'fraud upon a minority'. The court, however, looked for and D unsurprisingly did not find any allegation of common law fraud, supported by particulars, of a degree sufficient to displace registered title. It was on that basis that the learned judicial commissioner found for the respondents. In that respect he erred. But, as we observed at the outset, the totality of the facts disclosed in the appellant's pleadings and the relief claimed by him do not come within the ambit of the principle contended for so that E the order of dismissal was good.

There is a final point which we must address. Counsel for the appellant submitted that in the light of our disagreement with the reasons advanced by the learned judicial commissioner, the proper order that we should make is to restore the summons to file and direct it to be prosecuted F as a writ action.

This court is certainly empowered to do that by the provisions of O 28 r 8(1) Rules of the High Court 1980. But there is a discretion vested in a court whether to permit the conversion of proceedings commenced by originating summons into a writ action. See, *Cheow Chew Khoon (t/a* G *Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457. Despite the forceful argument of counsel, we were left uninclined to exercise discretion in the appellant's favour.

There are simply too many things wrong with this action as it is presently constituted. The intitulement of the appellant as plaintiff in his H personal capacity in what purports to be a derivative action is wrong. The facts as alleged do not appear to fall squarely within a minority shareholder's action on the ground that there had been fraud on the minority. The relief claimed does not appear to fit the facts alleged. In view of all these matters, we thought it best that the appellant should start with a fresh slate. That is why we gave the appellant liberty to file a fresh action by way of a writ.

I For the reasons given, the appeal was dismissed and we made those orders which are usually consequent upon a dismissal.

My learned sister, Siti Norma Yaakob JCA, has seen this judgment in draft and agrees with the reasoning and the conclusions therein.

*7 November 1995*

**Siti Norma Yaakob JCA**: I have had the advantage of reading the draft judgments of my brothers, Gopal Sri Ram and Abu Mansor bin Ali JJCA, and I concur with the reasons stated in both judgments when dismissing this appeal with costs.

*10 October 1995*

**Abu Mansor JCA**: I have had the benefit of reading the judgment in draft of my learned brother, Gopal Sri Ram JCA, with which I am in full agreement. As he said, we agree to dismiss this appeal but for a different reason given by the learned judicial commissioner who had held that the plaintiff had been unable to prove the high degree of fraud alleged.

For myself, I would like to say that because the plaintiffs themselves had not been so clear in what they were claiming and had not brought all the parties they should have had, this factor in a large measure, contributed to the difficulty found by the learned judicial commissioner trying this case. He certainly made the best of it and we commend him for that attempt.

No doubt, as the plaintiffs applied, we could have exercised our discretion to allow the plaintiffs to amend their claim and I agree with my learned brother judge that, there are so many flaws with the claim that we felt it would certainly be better if the plaintiffs begin all over again and we declined their application that we remit the case down. Whatever is the result, with the judgment of my brother judge, the plaintiff should, and probably a lot of others as well, now be in a better position to begin this kind of claim which is fraught with difficulties. I hope in the next round the plaintiff will be more ready. In the meantime, we confirm the learned judicial commissioner's judgment dismissing this appeal for a different reason with costs.

*Appeal dismissed.*

Reported by Azra Azman